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No. 91-1342

In the
Supreme Court of the United States
October Term, 1991

CONSOLIDATED BEEF INDUSTRIES, INC.,
individually and as a fiduciary under
the C.B.I., INC. PENSION PLAN,

Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY
and NEW YORK LIFE INSURANCE AND
ANNUITY CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly rule that purported state law claims relating to the administration of an ERISA plan are pre-empted even if no remedy is provided by ERISA?

2. Did the Court of Appeals properly rule that Petitioner's purported state law claims are pre-empted by ERISA because they relate to the administration of an ERISA plan?

3. Did the Court of Appeals properly rule that Petitioner had failed to make a proper showing under Rule 56 to support a claim for non-fiduciary liability under ERISA even if such a cause of action were cognizable?

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STATEMENT OF THE CASE

Respondents New York Life Insurance Company and New York Life Insurance and Annuity Corporation (collectively, "NYL") submit the following as an addition to the Statement of the Case found in the Petition for Writ of Certiorari of Consolidated Beef Industries, Inc. ("CBI").[1]

A. Background.

CBI sued NYL to recover damages allegedly resulting from administration problems CBI purportedly experienced with a 401(k) pension plan that it adopted for its employees in December 1985 (the "Plan"). CBI alleges that it entered into an oral contract with NYL to purchase a "turnkey program for operating a 401(k) plan," and that the Plan did not operate properly. Petitioner's Appendix ("Pet. App.") A-35-38. Based on the allegedly defective operation of the Plan, CBI asserted various state law claims and a claim for breach of fiduciary duty under ERISA.[2] Id. at A-46-47. CBI's state law claims and ERISA claim are all based on the same alleged conduct, and CBI seeks the same damages for each of its claims, including its purported ERISA claim. Id. at A-40, 42-43, 45-47.

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[1] Pursuant to Rule 29.1, Respondents state that New York Life Insurance Company is the parent company of New York Life Insurance and Annuity Corporation.

[2] CBI's state law claims allege, inter alia, that NYL breached a contract to provide a turnkey plan program (Pet. App. A-39); that the turnkey plan program breached implied warranties of fitness and merchantability under the UCC (Id. at A-41-42); that NYL misrepresented that the plan would be administered accurately and efficiently by PPNA (Id. at A-44-46); that NYL became a fiduciary to CBI by marketing and selling the plan program, and breached its fiduciary duty by failing to determine that PPNA's administration would be unsuccessful (Id. at A-45); and that NYL negligently failed to train and supervise its agents with regard to 401(k) plans and their administration (Id. at A-47). CBI also seeks punitive damages. (Id. at A-47.)

B. CBI's Principals.

When CBI adopted the Plan, its co-owners were Ronald Likas and Carl Kuehne. Ronald Likas was a former economic analyst and investment consultant for businesses, and he had for many years sold insurance products in the business market, along with his father, Frank Likas, who was a long-time agent for NYL. Eighth Circuit Joint Appendix ("8th Cir. App.") 90, 97, 123. Mr. Kuehne is an attorney who had represented CBI before purchasing the company. Id. at 82-84.

C. The NALAC/NYL Program.

In the spring of 1985, Frank Likas became aware of a new program regarding 401(k) retirement plans offered by NYL and North American Life and Casualty Company ("NALAC"). 8th Cir. App. 160. The details of this program were set forth in a Memorandum of Understanding between NYL and NALAC. Id. at 272.

According to the Memorandum of Understanding, agents who were licensed by both NYL and NALAC could market NYL individual annuities and NALAC life insurance policies for use as investment vehicles in 401(k) plans. Id. at § 1.5. The agents could also market the administrative services of Pension Planners of North America ("PPNA"), a division of NALAC. The provision of administration services was the exclusive province of NALAC/PPNA; NYL was precluded from acting as a plan administrator or fiduciary. Id. at §§ 1.1, 4.4, 15.3.

D. CBI Adopts a 401(k) Plan.

After reviewing materials regarding the program, Frank Likas told another NYL agent, Robert Billings, that

Billings should "enroll his son's company," i.e., CBI, in a 401(k) plan. They agreed that in return for doing the "leg work," Billings would receive 40% of the commissions, and Frank Likas would receive the remaining 60%. 8th Cir. App. 160-61, 163.

CBI adopted the Plan in December 1985. Id. at 244, 259. CBI appointed itself as the Plan administrator, and it hired PPNA to act as third-party administrator. Id. at 241, 244, 493-96; Pet. App. A-35-36. NYL is not mentioned anywhere in the Plan documents. NYL did not execute any written contracts with CBI or the Plan, except for the annuities it subsequently issued to the Plan trustee, pursuant to its direction.

E. CBI's Dissatisfaction with PPNA's Plan Administration.

After the Plan was implemented, CBI allegedly began experiencing problems with PPNA's administration of the Plan. In January 1987 CBI fired PPNA and replaced it with a new third-party administrator. 8th Cir. App. 75, 129. In June 1988, as part of a settlement agreement with CBI, NALAC paid the Plan $28,000 and further agreed to pay 25 percent of a statement for services from the successor Plan administrator. Id. at 266. In return, CBI released and discharged NALAC from all claims "arising out of . . . the 1985 sale, marketing and administration" of the Plan. Id. at 268. CBI then brought this suit against NYL for damages allegedly resulting from the same problems with the Plan's administration.

The district court granted NYL's motion for summary judgment. It held that CBI's state law claims were pre-empted by ERISA because they relate to the administration of the Plan. Pet. App. A-8. It also held that CBI had failed

to state a claim for breach of fiduciary duty under ERISA because CBI had failed to present any evidence that NYL was a fiduciary to the Plan. Id. at A-11.

The Court of Appeals for the Eighth Circuit, after a de novo review of the grant of summary judgment, affirmed. Id. at A-16. It, too, found that CBI's claims relate to the administration of the Plan, and that CBI had not presented any evidence that NYL was a Plan fiduciary. Id.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' RULING THAT ERISA PRE-EMPTS STATE LAW CLAIMS RELATED TO PLAN ADMINISTRATION EVEN IF NO ERISA REMEDY IS AVAILABLE IS CONSISTENT WITH THE RULINGS OF THIS COURT.

CBI argued before the Eighth Circuit Court of Appeals and the district court that its purported state law claims can only be pre-empted by ERISA if NYL is found to be a fiduciary under ERISA. Both courts rejected this contention, ruling that ERISA can pre-empt claims against nonfiduciaries because the availability of an ERISA remedy is not a requirement for ERISA pre-emption. CBI now contends these rulings were in error and that Supreme Court review is required because a conflict exists among the circuits on this issue.

CBI's petition should be denied because the Eighth Circuit correctly applied controlling Supreme Court precedent. Furthermore, CBI has failed to create an adequate factual record demonstrating that it lacked an ERISA remedy to make this an appropriate case for Supreme Court review.

A. Pilot Life Holds that an ERISA Remedy is Not Required for ERISA Pre-emption.

ERISA was intended by Congress to "establish pension plan regulation as exclusively a federal concern." Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 482 (1990) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)). To achieve this end, ERISA contains an express pre-emption provision. 29 U.S.C. § 1144(a). This Court has determined that ERISA's civil remedies scheme is exclusive. Pilot Life, 481 U.S. at 54-55. The express pre-emption provision pre-empts "any and all State laws insofar as they . . . relate to any employee benefit plan," 29 U.S.C. § 1144(a), (with certain exceptions not applicable here).[3]

Congress used the words "relate to" in their broad sense, rejecting more limited pre-emption language that would have made the clause applicable only to state laws concerning specific subjects covered by ERISA, such as fiduciary responsibility. FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983). Instead, the phrase "relates to" must be "construed expansively" and "given its broad common sense meaning," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), so that a state law "relates to" a benefit plan under ERISA's pre-emption provision "if it has a connection with or reference to such a plan." Pilot Life, 481 U.S. at 47 (quoting Metropolitan Life, 471 U.S. at 739); Ingersoll-Rand, 111 S. Ct. at 483.

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[3] State laws regulating insurance, banking and securities are exempt from pre-emption under ERISA's "savings" clause. 29 U.S.C. § 1144(b)(2)(A). CBI does not contend the savings clause applies. Furthermore, the parties agree CBI's plan is governed by ERISA. See 29 U.S.C. § 1002(2) (defining "pension plan").

In addition to ERISA's express pre-emption provision, this Court has held that ERISA's exclusive remedies provision, 29 U.S.C. § 1132(a), also has an implied pre-emptive effect. In Pilot Life the Court held that state law claims based on the improper processing of a claim for benefits were pre-empted based not only on ERISA's express pre-emption clause, but also on ERISA's civil remedies provision. 481 U.S. at 52-53. The Court held that the remedies contained in § 1132(a) were intended by Congress to be exclusive and that Congress "did not intend to authorize other remedies that it simply forgot to incorporate expressly." Id. at 54 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)).

Furthermore, the Court stated that ERISA's "pre-emptive force" was modeled after § 301 of the Labor-Management Relations Act of 1947 (the "LMRA"). 481 U.S. at 54. The Court emphasized that in so doing "Congress was well aware that the powerful pre-emptive force of . . . the LMRA displaced all state actions . . . even when the state action purported to authorize a remedy unavailable under the federal provision." Id. at 55 (emphasis added); see also Ingersoll-Rand, 111 S. Ct. at 485-86 (reaffirming that under Pilot Life ERISA displaces all state law claims regardless of whether ERISA provides a remedy). Thus ERISA, like the LMRA, need not provide a remedy to pre-empt state law.

The Eighth Circuit accordingly was correct when it held ERISA pre-empts CBI's purported state law claims despite the fact NYL is not an ERISA fiduciary. ERISA pre-empts any and all state law claims that "relate to" an ERISA plan, even if ERISA does not provide a remedy.

Virtually every circuit court that has addressed the issue has come to the same conclusion, as mandated by Pilot Life. See Smith v. Dunham-Bush, Inc., --- F.2d ---,

1992 WL 29049 (2d Cir. Feb. 7, 1992) ("the preclusion of remedy does not bar the operation of ERISA pre-emption"); Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989) (state law claims pre-empted despite lack of ERISA remedy); Hansen v. Continental Ins. Co., 940 F.2d 971, 979 (5th Cir. 1991) ("ERISA's pre-emption provision bars state law causes of action even though such pre-emption may leave a [plaintiff] without a remedy"); Lister v. Stark, 890 F. 2d 941, 946 (7th Cir. 1989), cert. denied, 111 S. Ct. 579 (1990) ("the availability of a federal remedy is not a prerequisite for federal pre-emption"); Olson v. General Dynamics Corp., 951 F.2d 1123, 1127 (9th Cir. 1991) ("There is simply no reason to assume that Congress intended ERISA's pre-emptive reach to be coextensive with the Act's civil remedial scheme."); Straub v. Western Union Tel. Co., 851 F.2d 1262 (10th Cir. 1988) (ERISA pre-empts state law claims despite lack of ERISA remedy); Howard v. Parisian Inc., 807 F.2d 1560 (11th Cir. 1987) (state law claims against non-fiduciary plan administrator pre-empted); see also Gibson v. Prudential Ins. Co., 915 F.2d 414 (9th Cir. 1990) (ERISA pre-empts state law claims against nonfiduciaries despite lack of ERISA remedy); American Federation of Unions, Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y, 841 F.2d 658 (5th Cir. 1988) (dismissing state law claims against insurance carrier on pre-emption grounds and dismissing ERISA claim because insurance carrier was not a fiduciary); Settles v. Golden Rule Ins. Co., 715 F. Supp. 1021, 1022 (D. Kan. 1989) (state law claims pre-empted even though defendant insurance company was not a fiduciary), aff'd, 927 F.2d 505 (10th Cir. 1991).[4]

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[4] Despite the holdings of the Fifth Circuit in Hansen and American Federation, CBI argues that the Fifth Circuit is not in accord with this majority view, citing Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990). Memorial held that a hospital which provided treatment to a patient based on the erroneous verification by her husband's employer that she was covered by (footnote cont'd)

Even the Sixth Circuit, which alone has erroneously held that ERISA pre-emption requires an ERISA remedy, see Perry v. P*I*E* Nationwide, Inc., 872 F.2d 157 (6th Cir. 1989), cert. denied, 493 U.S. 1093 (1990), has recently tacitly acknowledged the error of this conclusion.[5] In Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), the court held that state law claims were pre-empted because they related to an ERISA plan. In setting forth the scope of ERISA pre-emption, the Sixth Circuit correctly observed:

> Nor is it relevant to an analysis of the scope of federal pre-emption that appellants may be left without a remedy. Caterpillar Inc. v. Williams, 482 U.S. 386 . . . (1987).

944 F.2d at 1276.[6]

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an insurance policy (a "plan" under ERISA) could recover the cost of treatment from the employer and the insurance carrier under state law because "a cause of action based on such conduct would not relate to the terms or conditions of a welfare plan" or affect plan administration (contrary to CBI's claims). Id. at 250. The court did not hold that an ERISA remedy was required for ERISA preemption.

[5] The Sixth Circuit in Perry relied on the Eighth Circuit's pre-Pilot Life opinion in Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981), for the proposition that ERISA preempts state claims only where ERISA provides a remedy. 872 F.2d at 162. In rejecting CBI's contentions in this case, however, the Eighth Circuit held that Dependahl does not stand for this proposition. Pet. App. A-21. Perry is therefore not only contrary to Pilot Life, it is also based on an erroneous reading of Dependahl. See also International Resources v. New York Life Ins. Co., 950 F.2d 294, 298 (6th Cir. 1991) (stating that an ERISA remedy is required for pre-emption).

[6] In Caterpillar this Court reaffirmed that the LMRA preempts state law claims even where there is no federal remedy. Caterpillar Inc. v. Williams, 482 U.S. 386, 391 n.4 (1987).

The Sixth Circuit's failure to follow the dictates of Pilot Life is not at issue in this petition. The Sixth Circuit's erroneous interpretation of ERISA does not create a true conflict among the circuits, because the Supreme Court has spoken on this issue. The Eighth Circuit's ruling on this issue is correct and in accord with Pilot Life. Correcting the Sixth Circuit's erroneous view of ERISA pre-emption should take place on review of a Sixth Circuit decision.

CBI argues that Congress could not have intended to pre-empt its purported state law claims, because the purpose of ERISA is to protect plans and employees. This argument misses the mark. Congress decided that plan participants on the whole would best be served if plans were not subjected to potentially conflicting state laws, because of the inefficiencies that would result. See, e.g., Ingersoll-Rand, 111 S. Ct. at 485; FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990). "To argue that Congress has created a 'gap' in the law does not undermine the reasoning on which a finding of pre-emption is based." Olson v. General Dynamics Corp., 951 F.2d 1123, 1128 (9th Cir. 1991) (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987)). Any such "gap" results from Congress' policy decision to pre-empt state laws that do not regulate subject matters covered by ERISA, FMC Corp., 111 S. Ct. at 408, even if ERISA does not provide a remedy, Pilot Life, 481 U.S. at 55-56. CBI's argument is best addressed to Congress, not the courts.

B. The Factual Record Makes This an Inappropriate Case for Resolving the Alleged Conflict Between the Circuits.

Furthermore, CBI has failed to demonstrate, as a factual matter, that it had no ERISA remedy. All that has

been determined is that CBI has failed to state a claim against NYL for breach of fiduciary duty under ERISA. CBI may have had an ERISA remedy against NALAC for the damages CBI seeks in this suit, because CBI alleges NALAC was an ERISA fiduciary. Petition for Writ of Certiorari ("Petition") at 15. If CBI is correct, it may have been able to assert ERISA claims against NALAC. Instead, it chose to compromise its purported claims in a monetary settlement with NALAC. The settlement agreement provides that NALAC is compensating CBI for "losses claimed to have been sustained as a result of the marketing, sale and administration of the C.B.I., Inc. Pension Plan," (8th Cir. App. 266), i.e., the same alleged losses CBI seeks to recover from NYL in this case. Thus, CBI has not demonstrated, as a factual matter, that it lacked any remedy under ERISA for its purported claims. The lack of an adequate factual record makes this an inappropriate case for granting certiorari. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

II. THE COURT OF APPEALS' RULING THAT CBI'S STATE LAW CLAIMS RELATE TO PLAN ADMINISTRATION IS BASED ON A FACTUAL REVIEW OF THE RECORD AND IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. Certiorari is Inappropriate Because the Court of Appeals' Decision is Based on a Determination that CBI Failed to Make an Adequate Factual Showing under Fed. R. Civ. P. 56.

CBI argues that its purported state law claims are not pre-empted because they arose prior to the creation of the Plan, and that a conflict exists in the circuits as to pre-

emption of claims based on alleged pre-plan conduct. Even if such a conflict existed, CBI's petition does not adequately present this issue for review; the Court of Appeals found that CBI failed to show that its purported claims arose pre-plan, since they are based on allegedly improper plan administration. Discretionary review is inappropriate because no "special and important reasons" exist for reviewing this fact-based determination. See Johnston, 268 U.S at 227.

CBI does not, and cannot, dispute the well-settled principle that state law claims arising out of the administration of an ERISA plan "relate to" a plan and therefore are pre-empted. See Pilot Life, 481 U.S. at 57 (claim based on "improper processing of a claim for benefits" pre-empted); Shaw, 463 U.S at 105 & n.25 (ERISA pre-emption intended to preclude state interference in plan administration); Gibson v. Prudential Ins. Co., 915 F.2d 414, 416 (9th Cir. 1990) (pre-emption applies where "claims arise from the administration of [ERISA] plans whether directly or indirectly"); Jackson v. Martin Marietta Corp., 805 F.2d 1498, 1500 (11th Cir. 1986) (Congress intended "to preclude state law claims pertaining to the administration of employee benefit programs"); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985) (pre-emption applies where "the conduct challenged by each claim was part of the administration of an employee benefit plan").[7]

> As this Court has explained, ERISA was intended to:
>
> establish a uniform administrative scheme, which provides a set of standard

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[7] ERISA pre-emption is not limited, however, to claims relating to plan administration. See, e.g., Ingersoll-Rand, 111 S. Ct. at 484 (rejecting argument that ERISA pre-emption applies only to "those state laws that affect plan terms, conditions, or administration").

> procedures to guide processing of claims and disbursement of benefits. . . . Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-11 (1987).

Rather than disputing the principle that state law claims based on the improper administration of a plan are pre-empted, CBI argues that its claims relate to pre-plan representations because it was induced to buy an inherently defective turnkey plan that was destined to have administration problems. Thus, CBI argued below that its claims arose "independently of, and incidentally to, the administration of the plan." Appellant's Eighth Circuit Brief at 29.

The Court of Appeals rejected this argument, stating as follows:

> CBI's claims . . . arise directly from the administration of the plan. CBI attempts to argue that NYL should have foreseen these difficulties and thus its claims arose pre-plan and are not pre-empted. This assertion is simply not supported by the record. . . .

Pet. App. A-20-21 (emphasis added).

The Court of Appeals was correct: CBI's purported state law claims are based on alleged administration problems, not pre-plan conduct. As the district court aptly put it: "[T]he claims necessarily relate to errors in administration of the plan; otherwise, there would be no damages and thus no claims." Pet. App. A-8. The factual premise of CBI's

proposed issue for review was properly found lacking by the lower courts, and discretionary review by this Court would therefore be inappropriate.

B. Certiorari is Inappropriate Because the Court of Appeals' Decision that CBI's Claims Relate to a Plan is Correct Under Ingersoll-Rand.

Review of the Court of Appeals' decision would be inappropriate for the additional reason that it is correctly decided under Ingersoll-Rand. As an alternative basis for affirming the district court, the Court of Appeals properly rejected as untenable CBI's proposed distinction between pre-plan and post-plan conduct. The Court of Appeals held that regardless of when the alleged conduct took place, so long as the state law claims "relate to" the plan, they are pre-empted:

> Additionally, even if CBI's claims involved misrepresentation in the sale of the § 401(k) program, its claims still relate to the employee benefit plan. [Citations omitted]. Thus CBI's claims "relate to" an employee benefit plan and therefore are pre-empted.

Pet. App. A-21.[8]

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[8] The Court of Appeals cited Farlow v. Union Cent. Life Ins. Co., 874 F.2d 791 (11th Cir. 1989) and Childers v. Northwest Airlines, Inc., 688 F. Supp. 1357 (D. Minn. 1988). In Farlow, the court held that claims based on alleged misrepresentations about an ERISA plan were pre-empted, stating "[W]e reject the Farlows' contention that simply because their claims involve misconduct in the sale and implementation of the . . . plan, their claims do not relate to the plan." 874 F.2d at 794. In Childers, the plaintiffs argued their state law claims were not pre-empted because "they are founded on acts preliminary (footnote cont'd)

In Ingersoll-Rand, this Court held that state law claims based on allegations an employer terminated an employee to prevent him from becoming a plan participant so it could avoid making contributions to a pension plan "related to" the plan and were therefore pre-empted. This Court explained:

> [T]he existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.
>
> . . . .
>
> . . . The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan. . . . [I]n order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

111 S. Ct. at 483 (emphasis added).

Ingersoll-Rand's holding demonstrates the Court of Appeals was correct in ruling that CBI's claims "relate to"

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to the adoption and creation of the ESOPs and, therefore, do not have any connection or reference to any employee benefit plan," (the very same argument offered by CBI). 688 F.Supp. at 1364. The court rejected the argument because "[s]uch claims are 'related to' a plan . . . in the 'broad common-sense meaning,' Shaw, 463 U.S. at 97, 103 S. Ct. at 2900, of that phrase and are, therefore, pre-empted by ERISA." Id.

a plan, and it precludes the simplistic distinction CBI seeks to draw between pre-plan and post-plan conduct. CBI's claims are premised on the allegation that it was induced to purchase a "turnkey program for operating a 401(k) plan." See Pet. App. A-35. As CBI puts it in its petition, "The crux of CBI's claims related to preplan misrepresentations and inducement to purchase a 401(k) program that had inherent defects." Petition at 14. Even accepting this contention as true, CBI's state law claims would still be pre-empted, because each claim "makes specific reference to, and indeed is premised on, the existence of a pension plan." Ingersoll-Rand, 111 S. Ct. at 483. CBI's claim that it bought a "defective" plan "relates to" a plan, as that phrase is construed under Ingersoll-Rand. Certiorari should be denied because the Court of Appeals' decision was consistent with Ingersoll-Rand, and the distinction CBI would have this Court draw is untenable.

III. RESOLUTION OF THE ALLEGED CONFLICT REGARDING NON-FIDUCIARY LIABILITY IS IRRELEVANT TO DISPOSITION OF THIS CASE BECAUSE THE COURT OF APPEALS ACCEPTED CBI'S POSITION FOR PURPOSES OF THIS APPEAL.

The final issue CBI seeks to have reviewed is whether a non-fiduciary can be liable under ERISA if it knowingly participates in a breach of fiduciary duty by an ERISA fiduciary. CBI contends certiorari should be granted because a conflict exists among the circuits on this issue. Regardless of whether such a conflict exists, CBI ignores the fact that this case does not even present the issue for resolution, for two reasons.

First, CBI did not properly preserve the issue for appeal. CBI did not assert this theory of relief before the

district court, and therefore it could not properly raise the issue for the first time on appeal. Moran v. Aetna Life Ins. Co., 872 F.2d 296, 300 (9th Cir. 1989); Tisdale v. Dobbs, 807 F.2d 734, 740 (8th Cir. 1986). In fact, CBI has not even pleaded such a claim in its complaint. See Pet. App. A-32-49.

Second, the Eighth Circuit did not even address this issue, because it found that CBI had failed to offer any evidence to support such a claim. The Court of Appeals held as follows:

> CBI asserts that NYL has non-fiduciary liability. Relying on Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) (Freund), CBI asserts that a person who knowingly participates in a breach of trust under ERISA can be held liable under ERISA even though not a fiduciary. This court expresses no opinion on the validity of non-fiduciary liability because even under the standards in Freund, CBI has not proven NYL is liable as a non-fiduciary. . . . CBI claims that NYL developed a defective § 401(k) plan in conjunction with NALAC and PPNA. The mere marketing of the § 401(k) plan does not implicate fiduciary conduct, nor has CBI proven that the 401(K) plan was actually defective, only that it was administered poorly. NYL was not involved in the administration of the plan or any breach of trust that may have occurred in the administration of the plan.

Pet. App. A-24 (emphasis added). Thus, the Court of Appeals assumed that CBI's position on this issue was

correct, that a non-fiduciary can be liable for participating in a breach of fiduciary duty. It did so despite the fact CBI failed to plead such a claim or raise the issue before the district court. Review of this issue is irrelevant to the disposition of this case, because the Court of Appeals decided the issue in CBI's favor for purposes of its appeal.

The Court of Appeals' decision that summary judgment was properly granted based on its review of the record does not raise an issue suitable for review by certiorari. See Johnston, 268 U.S. at 227. Furthermore, the Court of Appeals' decision was clearly correct. The conduct that CBI points to as NYL's participation in a breach of fiduciary duty under ERISA is NYL's alleged development and marketing of a "defective" turnkey plan. Petition at 16. Yet CBI contends that this very same conduct does not even "relate to" the Plan under ERISA. Petition at 13-14. The Court of Appeals properly concluded that CBI failed to show that NYL had knowingly participated in an ERISA fiduciary's breach of fiduciary duty to the Plan, even assuming such a cause of action existed.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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